In The

Supreme Court of the United States

October Term, 1971

No. 71-1250

Dermott Noonan,

Petitioner,

—against

Midland Capital Corporation,

Respondent.

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF

A. Preliminary Statement

The respondent's argument in opposition misrepresents the petition in this proceeding. The validity of Rule 50b of the Federal Rules of Civil Procedure is not in question. This is made quite clear at the top of page 8 of the petition by this Court's decision in *Berry* v. *United States*, 312 U.S. 450, 453.

The point, as here indicated, is that the Court of Appeals in the *Noonan* case weighed and evaluated evidence and inferences and made a determination on contested facts, despite "a jury being the constitutional tribunal provided for trying facts in courts of law."

Petitioner submitted that an objective reading of the opinions below, even without further reference to the excerpts from the record and charge to the jury (pp. 13a-20a of the petition) demonstrates that the courts below engaged in a judicial process which this Court rejects. It therefore constituted a repetition of the same error made by the Second Circuit Court of Appeals that was previously pointed out to it by this Court in *Berry* v. *United States*, 312 U.S. 450, 453.

The conclusion in the petition to the effect that the *Noonan* case is supplantive of the *Baylis* case and provides a false beacon in the Second Circuit has, therefore, valid support for the issuance of this Court's writ.

B. Replying to Point I of Respondent's Brief.

Absent from Respondent's Brief is any rational explanation of the nature of Midland's obligation under the arrangement which it made with Noonan on April 10, 1967. Instead, respondent relies wholly on the District Court's naked conclusion that "there is not a scintilla of evidence that the defendant ever agreed, either as primary or secondary obligor, to be liable to plaintiff for his consulting service".

From this conclusion it inevitably follows, according to the courts below, that Noonan and Patrick were voluntarily working at Midland's request and in Midland's interest without any agreement by anybody to pay them for their services. The exercise of ordinary common sense rejects such a conclusion.

And it would further necessarily follow from the decisions of the courts below that the arrangement made April 10 rested optional with Midland whether Noonan should be paid anything whatsoever for the services he performed after May 1967. Obviously there was no expectation by anyone that Textured would pay Noonan out of its own funds for, as Noonan and Midland both knew, Textured had no such funds. Also, there was no agreement which required Midland to make or continue advances to Textured in any amount or for any fixed period of time and, without such an agreement between Midland and Textured, there was no valid basis for any assumption that Noonan relied or presumed on Textured's ability to pay him for his services.

The present application does *not* ask this Court to weigh the evidence, notwithstanding respondent's statement to the contrary.

That is what the courts below did in acting as the triers of the fact to sustain a defendant's verdict; and precisely in that lies the error complained of and the resulting denial of petitioner's right to trial by jury.

The sole question here is simply whether there is evidence on which a jury could find that the arrangement of April 10th included a promise by Midland to pay Noonan for his services. That there *was* such evidence sufficiently appears from the very recital of objective facts stated in the opinions below. And it is also demonstrated in the words of respondent's counsel when, in his argument made at the close of all the evidence, he stated:

> "MR. CHASE: Your Honor, I have looked at the record quite thoroughly last night also, and as I say to your Honor that there is not one word of any agreement being made between the parties inferentially or otherwise except as it relates to April 10 and that is it, your Honor, and the conversations which Mr. Noonan claimed took place on April 10."

and after saying "this is what happened", defendant's counsel quoted from the Record,

> "The answer is, 'I advised Mr. Schabacker, at the meeting of April 10, that our fee would be $7500 a month, which would include in part my time, Mr. Patrick's time, Mr. Crowley's time, which was perfectly satisfactory to Mr. Schabacker'.
>
> 'Q. Just tell us what he said.'
>
> 'A. This is what I said to him and he agreed.'
>
> 'Q. What did he say?'
>
> 'A. He said fine.'
>
> "That is it, your Honor.
>
> "Now, what did Mr. Schabacker say fine to?

> "Mr. Schabacker said "fine" to the fact that the fee would be $7500. That is what is referred to at page 16 and 17, that the fee would be $7500, but that Mr. Schabacker didn't agree that he would pay it. He *urged Mr. Noonan to take the undertaking*, in order to accomplish the fact that Mr. Noonan would undertake the undertaking that Midland would supply the necessary funds for the operation of the plant and for the payment of fees which would be for three months initially, through June 30. That is the entire record, your Honor, relating to any agreement made between Midland and Mr. Noonan." (p. 197 of Appendix in Court of Appeals.)

Respondent submits that on this described evidence also, alone and without more, a jury could reasonably have found as fairly to be inferred in fact the promise *by Midland* to pay Noonan the $7500 per month agreed upon.

Finally, the Chase argument at the trial shows definitely that there was an issue as to what was meant by the word "Fine" that was used by Mr. Schabacker. Now, in the answers to seven questions put to the petitioner, he stated the plain facts on that item and also with respect to the first two bills submitted by him which were paid by Midland as agreed to by Mr. Schabacker, but on which thereafter he was always put off with "Be patient, be patient, we're selling the business" (cf. *pp. 16a-19a of petition*).

Furthermore, the *conduit* method of payment was also recognized in the Trial Judge's very charge to the Jury:

> "It is for you to judge ultimately whether the payments made by Textured Products reflect the real essence of the deal or whether the defendant, Midland, had undertaken the primary obligations in spite of the fact that the payments were made by and the bills were rendered to Textured Products Company."
>
> (cf. Petition, p. 20a)

That such ultimate judgment on the facts was made by the Trial Court itself and not the jury, contrary to the *Baylis* mandate, therefore needs no exhaustive review of the record but only a mere examination of the District Court's own words in its charge to the jury.

The District Court's actions, in taking unto itself the role of the jury by rendering a verdict on its own view of the evidence, is also bespoken by the other excerpts from its own charge as set out on page 20a of the petition.

Baylis v. *Travellers Insurance Co.* which is quoted at page 14 of Petitioner's main brief, also negates the suggestion in Respondent's Brief (pp. 3-4) that the constitutional right to a jury trial is something different under the Federal Employees Liability Act than it is in actions on contract under the 7th Amendment.

Respondent's argument that because two courts below have agreed petitioner is precluded in this Court is repudiated by *Wilkerson* v. *McCarthy*, 236 U.S. at 64:

> "For these reasons, the trial court should have submitted the case to the jury, and it was error for the Utah Supreme Court to affirm its actions in taking the case from the jury."

The same applies to respondent's assertion that certiorari should not issue because Petitioner did not point out the constitutional nature of his right to a jury trial in the courts below. It is enough to say that the constitutional question is *ipso facto* raised on every motion for a directed verdict on the question where the facts and inferences are in dispute. This is basic and inherent.

The petitioner also in the Court of Appeals submitted the following language of this Court as to the constitutional right to trial by jury:

> *"Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury"*. Baker v. Texas & Pac. R.R. Co., 359 U.S. 227, 228.

C. Replying to Point II of Respondent's Brief.

Respondent's attempt to distinguish the decisions of this Court in *Davis* v. *Patrick* and *Emerson* v. *Slater* only confirms the applicability of these cases. While it is true that the statute of frauds was raised as a defense, in both of those cases it was held that the statute did not apply because the promise sued on was a *direct and original promise* by the defendant, not a collateral promise to answer for the debt or default of another.

Bulkley v. *Shaw* cited in Respondent's Brief (pp. 5-6) is on its face inapplicable because the opinion there expressly recognizes the distinction between a direct promise and a promise to answer for the default of another party where it is stated (289 N.Y. at p. 140):

> "Rosenkranz v. Schreiber Brewing Co. (287 N.Y. 322), is not in point. There, on Plaintiff's proof *there was no liability to him of any other person at the time defendant undertook to be his paymaster.* In that view, there was no principal obligation to which the promise could have been collateral with the result that the promise was original, or so the jury could have found under the charge".

In the instant case, there is no evidence whatsoever of any obligation by Textured to pay Noonan for the services requested by Midland. Midland's promise therefore made it the primary and sole obligor for the payment of Noonan's services, which were rendered at its request and in its interest in attempting to satisfy or reduce the indebtedness owed to it by Textured.

The *Noonan* case is not involved with mere physical facts of negligence or proximate cause but revolves about a disputed oral contract, and what the parties *meant* by what they said and did and this, as held in the *Grossman* case cited on page 9 of petitioner's main brief is also a matter within the province of the jury and is not for the court to decide:

> "It was for the jury to infer what was meant by the parties from what they said."
>
> *and*
>
> "A contract includes not only what the parties said but also what is necessarily to be implied from what they said". (cf. 206 N.Y. 466, 489.)

When Schabacher said "Fine" the minds of the parties had obviously met and it was for the jury, in accordance with the charge, *supra*, to make the ultimate determination of the case.

CONCLUSION

The *true question* here presented, therefore, is not whether the evidence was sufficient to sustain a verdict. The real question is whether the trial court without authority in law and in violation of plaintiff's constitutional right to a jury trial assumed the power to weigh admittedly disputable facts and circumstances after the jury that had been selected under its supervision failed to agree.

Petitioner submitted that an objective reading of the opinions below, even without further reference to the excerpts from the record and charge to the jury (pp. 13a-20a of the petition) demonstrates that the courts below engaged in a judicial process which this Court rejects. It therefore constituted a repetition of the same error made by the Second Circuit Court of Appeals that was previously pointed out to it by this Court in *Berry* v. *United States*, 312 U.S. 450, 453.

The legal significance of a decision, as often stated, lies not in what the court said but in what it decided; the decision and reasoning of the Court of Appeals conflicts with the decisions of this Court outlined in petitioner's main brief.

The *Noonan* Case, in its present posture, has the serious potential of providing a strong precedent, in the Second Circuit at least, which denigrates this Court's decision in the *Baylis* case and its further reaffirmations of the special province of the jury in cases such as *Berry* v. *United States, supra.*

Therefore, in summary of petitioner's argument and points, it is submitted that the *Noonan* decision, as enunciated and reflected in the published opinion of the Court of Appeals, can be most improvident in that it will provide erosive authority which undermines the jealous guardianship of the 7th Amendment announced by this Court in the *Baylis* case and the unique stewardship of this Court, within the judicial branch of the government, regarding this segment of the Bill of Rights.

WHEREFORE, petitioner respectfully prays that this Court's writ may issue as provided in the petition herein.

Respectfully submitted

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